



National Grain and Feed Association

October 4, 2001

Mr. Roger Hinkle
Chief, Licensing Authority Branch
Warehouse and Inventory Division
Farm Service Agency
U.S. Department of Agriculture
STOP 0553
1400 Independence Ave., S.W.
Washington, D.C., 20250-0553

Dear Mr. Hinkle:

The National Grain and Feed Association is pleased to submit the following statement in response to the U.S. Department of Agriculture Farm Service Agency's (FSA's) proposed rule for implementing the U.S. Warehouse Act (USWA) Amendments of 2000, as well as the proposed Licensing Agreement for Grain and proposed provider agreements, as published in the September 4, 2001 *Federal Register*.

The NGFA is the U.S.-based nonprofit trade association that consists of more than 1,000 grain, feed, processing and grain-related firms comprising 5,000 facilities that handle more than two-thirds of U.S. grains and oilseeds. The NGFA's membership encompasses all sectors of the industry, including country, terminal and export elevators; feed millers and manufacturers; cash grain and feed merchants; end users of grain and grain products, including processors, flour millers, and livestock and poultry integrators; commodity futures brokers and commission merchants; and allied industries, such as railroads, barge lines, banks, grain exchanges, insurance companies, computer software firms, and engineering/design/ construction companies. The NGFA also consists of 37 affiliated state and regional grain and feed associations, as well as two international affiliated associations, and has established strategic alliances with the Grain Elevator and Processing Society and the Pet Food Institute.

The NGFA was a strong proponent of the rewrite of the U.S. Warehouse Act, which was approved by Congress and signed into law on Nov. 9, 2000. The new law represents the most fundamental changes to the statute since its inception in 1916, and provides important flexibilities to USDA to modernize and streamline its regulations to reflect current warehouse industry trade practices. The NGFA strongly encourages FSA to utilize this flexibility in several important respects.

The NGFA particularly commends FSA for utilizing the authority provided in the statute to include provisions in its proposed rule that:

- authorize warehouse operators who store and handle grains, oilseeds and other agricultural products to issue electronic warehouse receipts, as well as other business documents under the authority of the U.S. Warehouse Act.
- expressly authorize arbitration as a means for resolving disputes between warehouse operators, depositors and other parties for activities authorized under the statute. The Federal Arbitration Act provides a firm U.S. statutory foundation for using arbitration as an alternative to costly and time-consuming court proceedings. The National Grain and Feed Association for more than a century has operated what is believed to be the oldest industry-based arbitration system in North America, and is an ardent advocate of this alternative form of dispute resolution as being a knowledgeable, fair, time-efficient, and cost-effective mechanism for resolving disputes.
- allow warehouse operators to forward stocks to other federal- or state-licensed or Commodity Credit Corporation-approved warehouses;
- enable warehouse operators to meet financial requirements by furnishing bonds, treasury notes (or other public debt instruments), letters of credit or certificates attesting to compliance with USDA-approved state indemnity funds;
- recognize current warehouse industry trade practices concerning the allocation of available storage space to traditional customers and storage of commodities traditionally handled in the geographical area in which the warehouse operates; and
- eliminate the previous requirement that federal warehouse receipts be issued on all grain within one year after deposit, and to instead require that warehouse receipts be issued upon the request of the depositor.

But the NGFA has major concerns with – and proposes alternative language for – several sections of FSA’s proposed regulations, Licensing Agreement for Grain, and provider agreements for computer services seeking FSA approval to transmit electronic warehouse receipts and other electronic documents. In particular, the NGFA opposes:

- the lack of a specific mechanism whereby FSA will obtain input from parties and organizations representing warehouse operators, depositors, providers, state warehouse control agencies and others directly affected by the agency’s regulations implementing the USWA and associated licensing and provider agreements;

- the overly expansive language concerning the types of disputes that potentially could be subject to arbitration under the proposed regulations;
- language in the proposed Licensing Agreement for Grain that fails to address and resolve the storage and delivery obligations of warehouse operators handling specialty grains and oilseeds with quality characteristics that exceed the numerical grade factors of the official U.S. Grain Standards;
- the proposed requirement that personnel of federally licensed warehouses who perform inspection and weighing of agricultural products be subjected to a test or examination to demonstrate their competency, rather than having this be the responsibility of the licensed warehouse operator;
- the proposed levels of financial and insurance requirements for providers of electronic warehouse receipts, other USWA electronic documents, and other electronic documents issued by FSA-approved providers;
- the proposed limit under which warehouse operators could change providers no more frequently than annually, regardless of circumstances; and
- outdated proposed language in the Licensing Agreement for Grain concerning the process for requesting an appeal of an inspection result.

The remainder of this statement provides specific comments concerning USDA's proposed regulations, proposed Licensing Agreement for Grain (Exhibit B), and proposed provider agreements for electronic warehouse receipts and other electronic documents (Exhibits C and E). The comments reference either the topic or the section number of the proposed rule or proposed agreement. *[Note: When recommending changes in the USDA-proposed language, new language is **boldfaced and underscored**, while deleted language is ~~stricken~~ through.]*

Proposed Regulations to Implement USWA

The NGFA offers the following comments on FSA's proposed regulations to amend 7 CFR Part 735 to implement the new U.S. Warehouse Act:

1. **New Regulatory Format:** The NGFA is troubled by the underlying reason – namely, the time-consuming and resource-intensive process of amending regulations – that has led FSA to propose a new regulatory format under which it would implement a single, broad, generic set of regulatory requirements that would apply to all warehouse operators licensed under the USWA, and reserve commodity-specific provisions for separate licensing

agreements that would be renewed annually. The NGFA would prefer that the rulemaking process itself be made responsive, rather than for government to attempt to devise creative approaches that circumvent the valuable public notice-and-comment that such a process entails.

The NGFA's major concern with the proposed regulatory format is that there is no requirement for FSA to provide advance notice or solicit comments from the affected industry sector(s) before implementing changes in the licensing agreements. Nor is there any restriction on the frequency with which such licensing agreements could be amended by FSA. Under the approach proposed by FSA, the only recourse afforded to licensees or providers is to utilize the voluntary nature of the federal warehouse system to discontinue their participation if either the licensing requirements or fees become onerous.

Thus, the **NGFA's support for FSA's proposed new regulatory framework is contingent upon FSA including as part of its regulations a specific mechanism through which to obtain input** from parties and organizations representing warehouse operators, depositors, providers, state warehouse control agencies and others directly affected by the agency's implementation of the U.S. Warehouse Act, as well as the licensing and provider agreements implemented under these rules. Further, the NGFA believes FSA should create a mechanism for soliciting input from affected parties and organizations in fulfillment of the statutory provisions found at Section 4(e) of the U.S. Warehouse Act amendments, which require the secretary of agriculture to publish an annual report on actions taken to minimize fees, improve efficiencies and reduce costs associated with the federal warehouse system.

NGFA Recommendation: To address this significant concern, the NGFA urges that Section 735.1 be amended as follows:

- Amend Section 735.1(b), which pertains to the applicability of the proposed regulations, to read as follows: ***"Additional terms and conditions may be set forth in applicable licensing agreements, provider agreements and other documents. Any amendments of a substantive or material nature to the applicable licensing and/or provider agreements shall be made only after FSA provides prenotice and at least 90 days to consult with, and obtain feedback from, affected parties."***
- Add a new Section 735.1(c) to read as follows: ***"No less than annually, FSA will convene a meeting with parties regulated under the Act, as well as organizations representing such parties, and State warehouse control agencies, concerning ways to minimize fees, reduce costs and enhance the efficient use of personnel to the extent practicable and consistent with the effective implementation of this Act."***

2. **Provider Agreements:** The NGFA strongly supports FSA's proposal to implement a system of computer system "providers" for transmitting electronic warehouse receipts and other electronic documents under the authority of the U.S. Warehouse Act. The NGFA also believes it is prudent for FSA, in consultation with the warehouse industry and state warehouse control officials, to standardize the formats for electronic warehouse receipts.

However, the NGFA believes FSA should **not** intervene to alter or dictate the format of other electronic documents – such as grade and weight certificates, phytosanitary certificates, bills of lading, export evidence certificates or other business-related documents required by letters of credit. The NGFA believes the formatting and content of these documents are more appropriately the role of other government agencies (such as the Federal Grain Inspection Service in terms of grade and weight certificates or the Animal and Plant Health Inspection Service in the case of phytosanitary certificates) or the private sector.

As noted in its previous comments to the agency, the NGFA, through its EDI Guidelines Committee, already has developed ANSI-based standardized business documents for bills of lading for rail, truck and barge; grade and weight certificates; and an invoice and settlement document. The NGFA believes this is an appropriate role for the association, given its long history of developing industry trading rules. In addition, an AgXML group has been working for several months to develop XML standards for the grain, feed and processing industry. This group's initiatives have focused on contracts, bills of lading (rail, truck and barge), and grade/weight certificates. Major industry participants are involved, as are several e-commerce companies (including Rooster.com, Pradium and 1st Ag). On the futures side, Refco has been an active participant. Monsanto and Pioneer Hi-Bred also have participated.

To facilitate the acceptance of e-commerce within the industry, it is important that these time-consuming and costly efforts to develop standardized documents continue. But the NGFA believes this is a role best suited for the private sector. Perhaps the most appropriate role for USDA – from both a technical expertise and cost standpoint – would be to become involved as an observer/participant in ongoing private-sector initiatives, and to assure that document formats include the information necessary under the USWA.

3. **Section 735.3 – Definitions:** The NGFA suggests amending the following proposed definitions:

- The proposed definition for “agricultural product” is inconsistent with the statute, and the NGFA recommends amending it to read: *“Agricultural product means an agricultural ~~produced product~~ **commodity** stored or handled for the purposes of interstate or foreign commerce, including a processed product of an agricultural product as determined by DACO.”*
 - The NGFA suggests adding the phrase “XML” to the list of electronic means cited in the definition of electronic document, as follows: *“Electronic document means a document that is generated, sent, received or stored by electronic, optical or similar means, including electronic data interchange, XML, electronic mail, telegram, telex or telecopy.”*
 - The NGFA recommends that FSA establish a definition for “USWA electronic documents” to clarify what types of documents are covered by this phrase, which is used repeatedly throughout the proposed rule.
 - The NGFA suggests that the proposed definition for “schedule of fees” be amended to read as follows: *“Schedule of fees means the fees charged by FSA for regulatory oversight of warehouse operators and providers licensed ~~services provided~~ under the Act”* so as to avoid confusion with fees assessed by warehouse operators or providers for services performed under the USWA.
 - The NGFA suggests that the proposed definition for “warehouse” be amended to be consistent with the statute, as follows: *“Warehouse means a structure or other approved storage facility, as determined by DACO, in which any agricultural product may be stored or handled for the purpose of interstate or foreign commerce.”*
- 4. Section 735.9 – Dispute resolution and arbitration of private parties:** As noted previously, the NGFA commends FSA for including in its proposed regulations the new statutory provision that authorizes the use of arbitration to resolve disputes arising under the U.S. Warehouse Act. However, the NGFA believes that the FSA-proposed language found in Section 735.9(a) is too broad. For instance, the use of the proposed phrase “another party” conceivably would permit arbitration of disputes between providers and those using such services, as well as disputes between government agencies and warehouse operators, depositors and providers. The NGFA does not believe this was FSA’s intent, and suggests that the scope of Section 735.9(a) be narrowed to apply to disputes involving the agricultural products stored or handled under the Act, unless contractually agreed otherwise by the parties.

This recommendation could be accomplished by amending this section to read as follows: “(a) Any claim for noncompliance or unresolved dispute between a warehouse operator and a depositor or holder of a warehouse receipt, or a provider and another party with respect to the storage or handling of agricultural products activities authorized under the Act may be resolved by the parties through mutually agreed-upon arbitration procedures or as may be prescribed in the applicable licensing agreement, or as contractually agreed by the parties.”

The NGFA also wishes to advise FSA that the ultimate determination of whether a dispute is arbitrable will depend upon the Arbitration Rules of the organization to which the case is submitted. For instance, under the NGFA’s Arbitration System, arbitration is compulsory only if the parties are NGFA members or if arbitration is referenced in the contract and at least one of the parties is an NGFA member. Concerning the latter, it has been the NGFA’s experience that courts frequently refer cases to arbitration. Since arbitration is a membership service, the NGFA does not arbitrate disputes unless at least one of the involved parties is an NGFA member.

The NGFA also believes that FSA should be more specific concerning the “arbitration assistance” it envisions offering under proposed Section 735.9(b). The NGFA suggests that such assistance be limited to providing documents or expert witnesses that may be requested by one or more parties involved in an arbitration case, and that this subsection be revised to specifically state that FSA will not be responsible for providing recommendations or representation to parties engaged in a dispute subject to an arbitration proceeding.

For these reasons, the NGFA proposes that Section 735.9(b) be revised as follows: “(b) In the event a party requests arbitration assistance from DACO, the initiating party will be responsible for all costs incurred by DACO. In no case will DACO provide representation to parties involved in an arbitration proceeding arising with respect to activities authorized under the Act.”

5. **Section 735.106 – Excess storage and transferring of agricultural products:** The NGFA suggests that Section 735.106(b) be amended to expressly provide for exchange of warehouse receipts as a method for transferring stored agricultural products to another warehouse, as well as to provide the flexibility for the deputy administrator for commodity operations (DACO) to authorize other methods not expressly provided for in the licensing agreement.

Specifically, the NGFA proposes that Section 735.106(b) be amended to read as follows: “(b) A warehouse operator who desires to transfer stored agricultural products to another warehouse may do so either by physical movement, transfer of warehouse receipts, or by other methods as may be provided in the applicable licensing agreement or as authorized by the DACO.”

6. **Section 735.108 – Inspections and examinations of warehouses:** The NGFA recommends that this section be amended to specifically state that the types of books and records accessible by warehouse examiners are those directly associated with the warehouse operator’s obligations under the USWA.

Specifically, the NGFA proposes that Section 735.108 be amended to read as follows: “Warehouse operators must permit any agent of the Department to enter and inspect or examine, on any business day during the usual hours of business, any licensed warehouse, the offices of the warehouse operator, and the books, records, papers and accounts directly pertaining to the warehouse operator’s obligations under this Act.”

7. **Section 735.111 – Fair treatment:** The NGFA commends FSA for replicating the new U.S. Warehouse Act’s language pertaining to the fair treatment of depositors by warehouse operators, which more appropriately reflects current trade practice.
8. **Section 735.200 – Service licenses:** FSA proposes in Section 735.200(b)(3) that the warehouse operator provide evidence that the applicant for a USWA license to sample, inspect, grade and weigh an agricultural product “is competent.” Subsequently, USDA proposes in Section IV.B. of the Licensing Agreement for Grain that employees inspecting or weighing grain at federally licensed warehouses be subjected to a competency test, on which we provide specific comments later in this statement.

The NGFA opposes the proposed testing requirement, believing that the USWA warehouse operator bears the ultimate responsibility for the education, training and performance of all employees, including graders and weighers licensed under the USWA. Therefore, the NGFA believes that Section 735.200(b)(3) should be revised to retain the current requirement that the warehouse operator certify that such employees are competent to perform these tasks.

9. **Section 735.300 – Warehouse receipt requirements:** The NGFA strongly supports FSA’s proposal to require that: 1) USDA approve the format for paper and electronic warehouse receipts; and 2) the warehouse operator not be required to issue warehouse receipts unless requested by the depositor. This latter provision would remove the current requirement that a warehouse receipt be issued within one year of deposit, regardless if requested by the depositor or owner. The current regulation has resulted in warehouse receipts being issued to parties who did not recognize their significance and who promptly lost or misplaced them, resulting in additional costs and business disruption for the warehouse operator. The NGFA would not be averse to FSA requiring that the warehouse operator provide other forms of written notification, such as a letter on company stationery, to depositors/owners of grain who do not request warehouse receipts as a means of communicating their ownership of such grain.

The NGFA also suggests that a new subsection (5) be added to this section to reflect the U.S. Warehouse Act’s prohibition on issuing duplicate warehouse receipts for the same agricultural product. Specifically, the NGFA suggests the addition of the following provision as a new Section 735.300(b)(5) applicable to paper warehouse receipts to replicate a similar provision found at Section 735.302(b)(5) for electronic warehouse receipts: **“May not issue, unless authorized by the DACO, an additional warehouse receipt under this Act for a specific identity-preserved or commingled agricultural product lot (or any portion thereof) if another warehouse receipt representing the same specific identity-preserved or commingled lot of the agricultural product is outstanding and uncanceled by the warehouse operator. No two warehouse receipts issued by a warehouse operator may have the same warehouse receipt number or represent the same agricultural lot.”**

The NGFA further notes that FSA proposes in Section 735.300(b)(5) that if any information is omitted purposely from a warehouse receipt, the blank should be notated to show that is the intent. In the proposed Licensing Agreement for Grain (Exhibit B), FSA proposes that such an omission be designated with a line drawn through such a space. The NGFA notes that this is not practical for electronic warehouse receipts. As an alternative, the NGFA suggests that if there is sufficient room in the fields for both paper and electronic warehouse receipts, that the phrase **“Intentionally Left Blank”** be used to designate such omissions. Further, the NGFA recommends that FSA communicate this requirement and how it is to be accomplished for both paper and electronic receipts as part of the agency’s information and education program when implementing the regulations.

- 10. Section 735.302 – Electronic warehouse receipts:** To enhance the use of electronic warehouse receipts and other electronic documents under the USWA, the NGFA believes that FSA should reduce by half the proposed amount of lead time that warehouse operators are required to provide to the agency – and the time accorded to the agency to respond – when changing providers for electronic warehouse receipts or other electronic documents.

The NGFA questions the intent of Section 735.302(a)(4), since subsection (a) of this section already states that if a warehouse operator elects to issue electronic warehouse receipts, he/she cannot issue paper receipts. The NGFA also believes it is important to clarify that this section does **not** preclude the warehouse operator from generating a nonnegotiable paper copy of an electronic warehouse receipt to present to a depositor or holder upon request.

Finally, contrary to the proposed rule, the NGFA also believes that FSA should **not** impose an artificial limit on the number of times that a warehouse operator could change providers during a calendar year. Such changes may be necessitated by a provider going out of business. Or, a change may be advantageous to the warehouse operator and its depositors/customers because of competitive factors in the marketplace, including the level of service furnished and the fees charged by the provider.

Therefore, the NGFA recommends that FSA **delete** the proposed requirement that warehouse operators not be allowed to change providers more frequently than once per year. However, if there is a cost incurred by the agency if a warehouse operator changes providers more frequently than annually (except in the case of the provider exiting the business), the NGFA would not be averse to the warehouse operator being charged the actual out-of-pocket costs incurred by FSA in making such a change.

For these reasons, the NGFA recommends the following changes:

- Section 735.302(a)(2): Amend to read as follows: *“Inform DACO of the identity of their provider, when they are a first-time user of EWRs, ~~60~~ **30** calendar days in advance of issuing an EWR through that provider. DACO may waive or modify this ~~60~~ **30**-day requirement as set forth in §735.2(b).”*
- Section 735.302(a)(4): Amend to read as follows: *“~~When using an approved provider,~~ **If electing to use EWRs, issue all warehouse receipts initially as EWRs. If requested by the depositor or holder, warehouse operators issuing EWRs also may issue a non-negotiable paper copy of the EWR, which shall be marked clearly as a ‘copy’ on its face.**”*

- Section 735.302(a)(7): Amend to read as follows: “*Receive written approval from FSA at least ~~30~~ **15** calendar days before changing providers. Upon approval, they may request their current provider to transfer their EWR data from its Central Filing System (CFS) to the CFS of the approved provider whom they select. ~~Warehouse operators may only change providers once a year.~~ **A nominal fee may be charged by FSA to the warehouse operator to recover the actual out-of-pocket costs incurred if he/she changes providers more frequently than once a year.***”
- Section 735.302(a)(8): Amend to read as follows: “*Notify all holders of EWRs by inclusion in the CFS at least ~~30~~ **15** calendar days before changing providers, unless otherwise required or allowed by FSA.*”
- Section 735.302(b)(5): Replace in its entirety the proposed language pertaining to issuing duplicate warehouse receipts for electronic warehouse receipts to be identical with the NGFA-suggested language for paper receipts cited earlier: “**An EWR under this Act may not be issued for a specific identity-preserved or commingled agricultural product lot (or any portion thereof) if another EWR representing the same specific identity-preserved or commingled lot of the agricultural product is outstanding and uncanceled by the warehouse operator. No two warehouse receipts issued by a warehouse operator may have the same warehouse receipt number or represent the same agricultural lot**”;
- Finally, the NGFA recommends that FSA include provisions in this section under which warehouse operators may discontinue the use of electronic warehouse receipts if they so choose. Such a provision is appropriate to give warehouse operators the flexibility to respond to customer preferences, changing business conditions or cost structures associated with electronic warehouse receipts, or service-related issues.

Specifically, the NGFA recommends creation of a new Section 735.302(d), which would read as follows: “**A warehouse operator at any time may elect to discontinue issuing electronic warehouse receipts, in which case the operator must notify FSA, the provider and all holders of uncanceled electronic warehouse receipts at least 30 calendar days in advance. Outstanding and uncanceled electronic warehouse receipts may be transferred to paper receipts upon notification to FSA and the holder.**”

- 11. Section 735.401 – Electronic warehouse receipt and USWA electronic document providers.** The NGFA strongly opposes the levels of financial and insurance requirements proposed by FSA for providers of electronic warehouse receipts and other USWA electronic documents.

There is substantial evidence that the costs of insurance in the amounts proposed by FSA are prohibitive, and that the availability of insurance at such levels of coverage may be extremely difficult to obtain. Further, the NGFA believes that the coverage levels being proposed are not justified by the risks, since providers simply are the transmitters of electronic documents – the information for which is generated by the warehouse operator – and do not take title to the commodity. In this respect, providers are akin to a distributor of paper documents, such as the U.S. Postal Service or other express delivery service. In addition, there is evidence that insurance carriers are unwilling to offer policies with the deductibility provisions proposed by FSA in its separate provider agreements.

For these reasons, the NGFA believes that FSA's current proposals would, at best, dramatically reduce the number of providers willing or able to offer such services. Such an outcome would limit the ability of warehouse operators and others to capture the efficiencies that may result from increased use of electronic warehouse receipts and e-commerce. And it would inhibit the market efficiencies that could result from competition among providers. At worst, the FSA-proposed financial and insurance requirements could preclude any providers from participating.

These concerns over the availability and cost of insurance are exacerbated by the recent terrorist attack on the United States. In the aftermath of these tragic events, insurance carriers expect – at least for the foreseeable future – to incur significant financial losses, which could further tighten the availability and escalate the costs for insurance coverage.

The importance of FSA adopting realistic and achievable financial and insurance requirements for providers is further magnified by the fact that State warehouse licensing authorities indicate that they intend to recognize only FSA-approved providers for issuing electronic warehouse receipts under State warehouse laws. Thus, FSA is placed in the role of being the “gatekeeper” through which providers must pass. If FSA's regulatory or financial standards are excessive, it will undermine the viability of electronic warehouse receipt systems developed under state law, or create a patchwork of standards for providers that will not serve the interests of warehouse operators, providers, depositors, government or other parties. As an additional oversight safeguard, FSA also should recognize that companies providing insurance coverage to providers have indicated that they will be performing their own frequent internal audits.

Therefore, particularly at the outset of this program for grain, it is important that USDA implement prudent but realistic regulatory and financial requirements for providers.

In consultations with potential providers of electronic warehouse receipts and other e-documents for grain warehouse operators, as well as existing providers of electronic warehouse receipts for cotton and state warehouse control officials, the NGFA strongly urges FSA to reduce substantially the proposed financial standards for providers of electronic warehouse receipts and other USWA electronic documents. While the NGFA has not been able to arrive at a consensus recommendation, we generally believe that financial requirements approximating or somewhat greater than the following may be appropriate:

- Minimum net worth of \$100,000 for providers of electronic warehouse receipts **and** other USWA electronic documents, the same level proposed by FSA.
- Maintain two insurance policies, one for “errors and omissions” and one for “fraud and dishonesty,” each with a minimum coverage of \$1 million (as opposed to the \$4 million for each proposed by FSA). In addition, the NGFA recommends that FSA evaluate the feasibility of allowing providers to furnish other forms of financial assurance, similar to those allowed for warehouse operators under Section 735.102 of the proposed regulations, to meet the insurance requirements under this section. These other forms of financial assurance could include bonds, letters of credit, Treasury bills and irrevocable letters of credit.
- The NGFA also believes USDA should reexamine the feasibility of the proposed \$10,000 deductible requirement for insurance for providers.

Under the aforementioned NGFA recommendations, providers that have and maintain a minimum net worth of \$100,000 and maintain two insurance policies – for “errors and omissions” and “fraud and dishonesty” – with coverage of \$1 million each, or which provide other forms of financial assurance acceptable to FSA to offset part or all of these insurance requirements, would be eligible to engage in services for transmitting **both** electronic warehouse receipts and other electronic documents as provided under Sections 735.401 and 735.402 of these regulations.

To provide additional assurance to users of providers’ services, as well as to government, the NGFA recommends that FSA consider relocating the financial and insurance requirements found in proposed Sections 735.401 and 735.402 to the provider agreements themselves, so that they may be modified more expeditiously if conditions warrant. This also would be consistent with the treatment of financial assurance requirements applying to warehouse operators, the specific requirements for which are found in the Licensing Agreement for Grain (Exhibit C) rather than in Section 735.102 of the proposed regulations.

Also concerning Section 735.401, the NGFA seeks clarification of what other types of documents FSA has in mind when it uses the term “USWA electronic documents” in Section 735.401(a). How, if at all, do these electronic documents differ from “other electronic documents” addressed under Section 735.402?

12. Section 735.402 – Providers of other electronic documents: Consistent with the comments made pursuant to Section 735.401 – and for the same reasons – the NGFA strongly urges FSA to reduce the financial and insurance requirements for providers of other electronic documents issued under the authority of the USWA. While the NGFA has been unable to reach a consensus recommendation, it generally believes that financial standards approximating or somewhat greater than the following may be prudent:

- Minimum net worth of \$100,000, rather than the \$10 million level proposed by FSA.
- Maintain two insurance policies, one for “errors and omissions” and one for “fraud and dishonesty,” each with a minimum coverage of \$1 million (as opposed to the \$25 million for each proposed by FSA). In addition, consistent with the recommendations made pursuant to Section 735.401, the NGFA recommends that FSA evaluate the feasibility of allowing providers to furnish other forms of financial assurances, similar to those allowed for warehouse operators under Section 735.102 of the proposed regulations, to meet the insurance requirements under this section. These other forms of financial assurance could include bonds, letters of credit, Treasury bills and irrevocable letters of credit.

The NGFA notes that in the preamble of the proposed rule (*page 46311*), FSA attempts to justify the “significantly greater” financial and insurance requirements for providers of other electronic documents by stating that these documents somehow constitute a greater risk or that providers distributing them assume a greater liability because they “generate” these documents. It is the NGFA’s understanding that is not the case, any more than it is for electronic warehouse receipts. These providers merely transmit electronic documents containing information generated by other parties.

However, to reduce perceived risk, the NGFA subsequently in this statement recommends two changes to the proposed provider agreement for these documents:

- First, the NGFA suggests eliminating a clause that permits providers to generate electronic files of paper documents submitted to them, as well as the eliminating – for the time being – letters of credit as an electronic document covered under this provider agreement. [*See page 26.*]

- Second, FSA could defer approval of providers to transmit letters of credit electronically until later, or create a higher financial standard for providers seeking USDA approval of their systems for transmitting letters of credit because of the inherent complexity of these particular documents.

The NGFA offers these additional recommended changes to this section:

- Section 735.402(a): The NGFA believes it is important that FSA clarify that the intent of this section is to authorize USDA to grant approval of providers that meet the agency's financial and oversight requirements, not the specific content or format of electronic documents other than electronic warehouse receipts. For these reasons, the NGFA suggests that this subsection be amended to read as follows: "*(a) Application for a provider agreement to establish a USDA-approved system to issue and transfer other electronic documents may be made to FSA upon forms prescribed and furnished by DACO. Each provider operating pursuant to this section must meet the following requirements:...*" In this regard, the NGFA suggests that the preamble of the proposed regulations be amended to include a paragraph clarifying that this section is voluntary and simply allows the provider to indicate that its service has been approved by FSA for issuing the specified electronic documents, but does not imply FSA oversight or approval of the format or content of electronic documents other than electronic warehouse receipts or other electronic USWA documents.
 - Section 735.402(c)(2): The NGFA suggests that this section be amended to specifically reference that the type of electronic documents being addressed are those the provider has been authorized to issue by FSA under the authority of the U.S. Warehouse Act. We do not believe FSA's "reach" should extend to other electronic documents over which the agency does not exercise regulatory oversight. Specifically, it is recommended that this subsection read as follows: "*(2) Suspended or terminated providers may not execute any function pertaining to any electronic ~~document~~ warehouse receipts or other electronic USWA documents it has issued pursuant to Provider Agreements executed under the authority of this Act during the pendency of any appeal or subsequent to this appeal if the appeal is denied, except as authorized by DACO.*"
13. **Section 735.404:** The NGFA recommends that this section be amended to not preclude reductions in fees charged by providers over the course of a year. Specifically, the NGFA recommends the following changes to subsections (b) and (c):

- “(b) Fees charged any user by the provider must be in effect for a minimum period of one year, except that fees may be reduced at any time.”
- (c) Providers must furnish the FSA and all users a 60-calendar day advance notice of their intent to ~~change~~ increase any fee. FSA and all users are to receive notice of any reduction in fees within 30 days after they have taken effect.”

Proposed Licensing Agreement for Grain (Exhibit B)

The NGFA offers the following comments concerning FSA’s proposed licensing agreement for grain found in Exhibit B:

1. **Section III.A. Financial Assurance Requirements – Computation:** The NGFA recommends the following changes to this section:
 - Section III.A.3.: In its list of descriptors to letters of credit, the NGFA recommends that USDA replace the term “clean” with “unconditional” and add the additional modifier “assignable,” so that this sentence would read: “Any letter of credit must be ~~clean~~ unconditional, assignable, irrevocable, issued by a commercial bank payable to the Farm Service Agency by sight draft and insured as a deposit of the Federal Deposit Insurance Corporation.”
 - Section III.A.4.: The NGFA seeks clarification from USDA concerning the types of conditions existing at a warehouse that it believes would warrant requiring additional financial assurance.
2. **Section III.B. Financial Assurance – Acceptable Forms:** The NGFA commends FSA for providing alternatives to bonding for warehouse operators to meet deficiencies in net worth.

However, the NGFA recommends that Section III.B.5. be amended, consistent with its suggested changes to the proposed rule, to authorize FSA to approve other forms of financial assurance that are not prescribed in the licensing agreement and related addenda. It is suggested that this subsection be revised to read as follows: “5. Other forms of financial assurance as may be prescribed in the applicable licensing agreement and related addenda, or as may be deemed acceptable by the Farm Service Agency.”

3. Section IV.A. Duties of Warehouse Operator:

- **Section IV.A.2.:** The NGFA commends FSA for incorporating provisions of the statute that reflect current trade practice regarding the allocation of available storage space to traditional customers.
- **Section IV.A.3.:** The NGFA recommends that the phrase “specially binned grain” be revised to read “identity-preserved grain” to be consistent with Section IV.N.
- **Section IV.A.5:** The NGFA recommends that the phrase “straw, detritus, rubbish or accumulations” be deleted because it is outdated and replaced with the term “deleterious.” It also is recommended that a provision be added that stipulates that the warehouse is to be accessible to examiners during normal business hours. These changes could be accomplished with the following suggested language: *“5. Keep the warehouse reasonably clean at all times and free from ~~straw, detritus, rubbish, or accumulations~~ of deleterious materials that ~~will~~ may create a hazard or interfere with the handling of grain, ~~and~~ provide a safe environment in and around the warehouse, ~~and will~~ provide all reasonable and necessary assistance in the execution of inspections and examinations by representatives of the Farm Service Agency during normal business hours.”*
- **Section IV.A.6.:** The NGFA recommends that this subsection specifically reference that it applies to commingled grain, and that the phrase “for the numerical grade” be inserted at the end of the last sentence, so that it reads: *“...in case the grades of commingled stored grain should get out of balance with grades represented by outstanding storage obligations, to effect the necessary corrective actions to regain the quality and quantity equity for the numerical grade.”*

4. Section IV.H. Excess Storage and Transferring Grain:

- **Section IV.H.1 and 2:** The NGFA notes that this language is redundant with requirements already included in the proposed regulations at Section 735.106(a).
- **Section IV.H.2.c.:** The NGFA commends FSA for permitting the transfer of grain from a federally licensed warehouse to another federal- or state-licensed warehouses – or to Uniform Grain Storage and Rice Agreement warehouse in states without licensing authorities – to maximize the efficiency of such transfers.

- **Section IV.H.2.h.:** The NGFA recommends the following revisions to be consistent with recommendations made subsequently pursuant to Section IV.N. concerning commingled and identity-preserved storage: ***“In the case of commingled storage, nothing in this agreement will in any way diminish the right of the owner of the grain to receive on delivery, or the obligation of the warehouse operator of a licensed warehouse from which the product is transferred, to deliver to the owner, grain in the quantity, and of the kind, ~~quality~~ numerical grade, class (and the subclass white club wheat) and grade called for by the warehouse receipts or other evidence of storage. In the case of identity-preserved storage, nothing in this agreement diminishes the right of the owner of the grain to receive the identical grain originally stored in the warehouse.”***
- 5. **Section IV.J. Inspections, Examinations of Warehouse:** It is recommended that this section be revised to stipulate that FSA’s authority to examine warehouses and records is limited to activities performed directly related to the U.S. Warehouse Act. The NGFA suggests the following language: *“The warehouse operator agrees to permit any officer or agent of the U.S. Department of Agriculture, authorized by the Farm Service Agency, to enter and inspect or examine on any business day during the usual hours of business any warehouse for which they hold a license, the office, ~~the~~ books, records, papers, and accounts **directly relating to activities performed under this Act** and the contents thereof, and will furnish that officer or agent the assistance necessary to enable making any inspection or examination.”*
- 6. **Section IV.L. Storage of Identity-Preserved Grain:** The NGFA recommends that Section L.2.a be revised to read: *“a. Clearly mark with identification each bag, ~~or~~ container **or bin**.”*
- 7. **Sections IV.N (Delivery of Fungible Grain), O (Storage Obligations), P (Out-of-Condition and Damaged Grain) and Q (Reconditioned Grain):** One of the NGFA’s highest priorities in implementing regulations under the new U.S. Warehouse Act is to resolve, consistent with current trade practice, the storage and delivery obligations of warehouse operators handling specialty grains.

It is a customary trade practice for warehouse operators handling specialty grains to store such commodities on a commingled basis. Further, warehouse operators should not be required to receipt specialty grain on an identity-preserved basis; in many cases, the warehouse operator instead pays a premium to the producer of specialty grains to reflect the additional intrinsic quality characteristics. But the language proposed by FSA in these sections of the licensing agreement fails to address this issue in a satisfactory manner.

In addition, the NGFA recommends that language in these sections of the grain warehouse licensing agreement that requires the warehouse operator to request payment for accrued charges be deleted, since this is a trade practice of the cotton – but not the grain – warehouse industry.

The NGFA also recommends that the provisions related to the acceptance, storage and delivery of grain be consolidated into a single section.

For these reasons, the NGFA recommends that Sections N., O., P., and Q. of the proposed licensing agreement be struck in their entirety and replaced with the following new section:

“N. Obligations for Storage and Delivery of Fungible Grains and Oilseeds

“1. The warehouse operator is free to store in any manner that results in his/her ability to deliver grain, as a bailee for hire, that meets or exceeds the quantity and quality specifications shown on the warehouse receipt or the original delivery receipt (scale ticket) appropriate for a commingled or identity-preserved lot as described below:

“a. Commingled Storage: Upon proper presentation of a warehouse receipt for any grain, other than identity-preserved grain, and payment of all accrued charges associated with the storage of the grain, deliver to the depositor or lawful holder of the warehouse receipt grain in the quantity, and of the kind, class (and the subclass white club wheat) and numerical grade called for by the warehouse receipts or other evidence of storage; or

“b. Identity-Preserved Storage: Upon proper presentation of a warehouse receipt for any identity-preserved grain and payment of all accrued charges associated with the storage of the grain, deliver to the person lawfully entitled thereto, the identical grain stored in the warehouse. Nothing in this section shall require the warehouse operator to offer identity-preserved storage.

“2. The warehouse operator is not required to accept delivery of grain that is of a kind, type or quality not customarily stored or handled in the area in which the warehouse is located, or that is tendered in a manner that is not consistent with the ordinary and usual course of business.”

“3. Out-of-Condition and Damaged Grain: The warehouse operator may refuse to accept grain offered for storage if its condition is such that it will adversely affect the condition of existing grain in the warehouse, unless the warehouse operator chooses to separately bin and condition the grain.

“4. Reconditioning Grain: The warehouse operator agrees to:

“a. Immediately notify the owners and the Farm Service Agency when grain is going out of condition, if the warehouse operator is unable to condition the grain and stop the deterioration; and

“b. Follow instructions received.”

- 8. Section IV.R. Warehouse Receipts:** To improve the organization of the licensing agreement, the NGFA recommends that this section be retitled as **“Section V. Warehouse Receipts,”** and that the retitled section consist of two major subsections: **“V.1. Electronic Warehouse Receipts”** and **“V.2. Paper Warehouse Receipts.”**

Concerning the time frames specified in the licensing agreement pursuant to changing providers and issuing electronic warehouse receipts, the NGFA recommends that they be amended to be consistent with the NGFA’s comments relative to Section 735.302 of the proposed regulations. Alternatively, these duplicative sections could be deleted in either the licensing agreement or the proposed regulations, since they are redundant.

- Existing Section IV.R.1.b. should be amended to require warehouse operators to notify all holders of electronic warehouse receipts at least 15 (rather than 30) calendar days before changing providers. In addition, the last sentence that prohibits warehouse operators from changing providers should be deleted in its entirety.
 - Existing Section IV.R.1.g. should be amended to require warehouse operators to notify FSA 30 days (rather than 60 days) prior to issuing electronic warehouse receipts through a new provider.
 - Existing Section IV.R.2.c. through g.: The NGFA notes that these sections are redundant with the proposed regulations found at Section 735.302(b)(3) through (7), and questions whether they need to be included in both places.
- 9. Section V. Paper Warehouse Receipts:** As noted previously, the NGFA recommends that this section be retitled as **“Section V.2. Paper Warehouse Receipts.”** In addition, the NGFA recommends that:
- Existing Section V.B.2.i. be revised to be consistent with the NGFA’s recommended changes to Section 735.300(b)(5) of the proposed regulations – specifically to incorporate the phrase **“Intentionally Left Blank”** to designate an intentionally blank space on warehouse receipts.

10. Section VI. Service Licenses:

- Section VI.B.: The NGFA strongly opposes FSA's proposal to implement a new requirement that personnel licensed to sample, inspect, grade or weigh grain under the USWA submit to an examination or test. As mentioned previously, it is the NGFA's view that the warehouse operator is responsible for determining the qualifications and training of his/her personnel, and ultimately for every employee's performance. Further, since this is a new requirement, it would entail additional costs not accounted for in the Regulatory Impact Analysis prepared by FSA. The NGFA recommends that this section be deleted in its entirety.
- Section VI.F.3. The NGFA believes this section, which pertains to the availability of inspection results, is written too broadly, and could be misinterpreted to apply to lenders or other curious individuals. The NGFA suggests that it be revised to apply only to the depositor or holder of the warehouse receipt. The NGFA suggests the following alternative language: *"3. As soon as possible after grading any grain, and not later than the close of business on the next following business day, make accessible to the ~~parties interested in a transaction in which~~ depositor of the grain or holder of the warehouse receipt ~~is involved~~ at the location of the license, a copy of the inspection certificate issued by the licensed inspector."*

11. Section VII. Grain Grading: The NGFA is concerned that Section VII.B. (which is redundant with Section 735.202 of the proposed regulations) could create confusion as currently written. For most whole grains and oilseeds, official standards already exist under the U.S. Grain Standards Act.¹ Thus, it appears that of the commodities listed in the proposed definition of grain in Section I. of the licensing agreement, proposed Section VII.B. applies primarily to field peas, safflower seed, emmer and millet. Further, it is the NGFA's understanding that FSA is considering a separate licensing agreement for persons wishing to be licensed under the USWA for processed commodities, such as soybean oil or soybean meal, which currently are not being stored or handled under the U.S. Warehouse Act, but which potentially could be under the broad definition of "agricultural product" contained in the new statute.

To provide clarity, the NGFA believes it would be useful for the licensing agreement to specify in Section VII the specific types of grains and oilseeds for which official standards exist, particularly since it could be amended periodically to reflect any changes. The following language is suggested:

¹ Official standards under the U.S. Grain Standards Act currently are established for barley, canola, corn, flaxseed, mixed grain, oats, rye, sorghum, soybeans, sunflower seed, triticale and wheat.

“A. Official Grain Standards of the United States. The Official Grain Standards of the United States are hereby adopted as the ~~official grain~~ standards for inspecting and grading grain the purposes of the under this Act and the regulations, for barley; canola; corn; flaxseed; mixed grain; oats; rough, brown and milled rice; rye; sorghum; soybeans; sunflower seed; triticale; wheat; and whole dry peas, split peas and lentils.

“B. Standards of Grade for Other Grain. Until Official Standards of the United States are ~~fixed and~~ established for ~~the kind of grain~~ emmer, safflower seed, millet and such other products stored in grain warehouses that are to be inspected, the grade quality of the grain will be stated, subject to approval of the Farm Service Agency...(continue with existing subsections VII.B.1 through 3.)”

11. Section VIII. Grain Appeals: The NGFA recognizes that the language proposed by FSA for conducting appeals of the results of inspections of grain graded under the Act is identical to the existing regulations found at Sections 736.80, 736.81 and 736.82 under the old statute.

However, the NGFA believes these provisions need to be updated to reflect current industry trade practice, and present several operational impracticalities as currently written. In particular, it is impractical to require a warehouse operator to retain the entire lot of grain pending possible appeal by the depositor or his/her agent after the grain is deposited. Instead, a retained sample representative of the commingled lot should be used for appeals, unless the depositor requests that the grain be stored on an identity-preserved basis and assumes the responsibility for charges associated with such storage.

The NGFA also notes that in some respects, the use of the term “grade” may be inappropriate if an official grain standard has not be developed for the commodity. Finally, the process outlined in the FSA-proposed language in Section VIII.C.5. is inconsistent with actual appeal inspection procedures currently in effect.

For these reasons, the NGFA suggests that Section VIII. B., and C. be revised as follows:

“B. Request for Appeal

“1. The warehouse operator agrees to accept a request for an appeal inspection if notified in writing by the depositor or holder of the warehouse receipt ~~made by written notice to the warehouse operator before the identity of the lot of grain has been lost and not~~ by no later than the close of business on the first business day ~~following furnishing of~~ after being furnished a statement of the results of the original ~~grade~~ inspection.

"2. If the appeal is requested by the warehouse operator, notice must be given promptly to the owner of the grain. Oral notice may be made if followed by written notice." [Unchanged from FSA proposed language.]

*"3. ~~Where it is not practical for the warehouse operator to maintain the identity of all grain being received for storage until depositors receive a statement of grade and consequently an opportunity for appeal, a~~ **For commingled grain, a** depositor or agent, before or at the time of delivery of grain, may request that the warehouse operator retain ~~the identity of a~~ **representative sample from** such lot until ~~the~~ depositor has been furnished with a statement of the ~~grade~~ **inspection result** for the lot and has waived or requested and received an appeal inspection ~~grade~~ **result**.*

"4. ~~The warehouse operator need not preserve the identity of the lot in the original conveyance; but with the knowledge and consent of the depositor or agent may use other means to preserve such identity. Further, if compliance with such request would adversely affect receiving, storing or delivering the grain of other depositors, the warehouse operator may defer unloading the grain until such time as would not disrupt service to other depositors but without unnecessary delay to the party making such request.~~

"C. Appeal Sampling, Preservation, Delivery and Examination.

*"1. ~~For commingled grain, The~~ **a retained sample representative of the** lot of grain for which an appeal is requested **shall be used to determine the appeal inspection result.** ~~For identity-preserved grain, the lot~~ ~~must~~ **may** be re-sampled in such manner and quantity as the depositor or holder of the warehouse receipt and the warehouse operator agree results in a representative sample of the lot acceptable to each for appeal purposes. If the parties are unable to agree on such a sample, a sample drawn by a duly licensed inspector in the presence of the ~~interested party~~ **depositor or holder** ~~must~~ **shall** be deemed binding. In no case will the sample be less than 2,000 grams by weight.*

"2. ~~The sample must be packaged, to the satisfaction of the interested parties, so as to preserve its original condition.~~"

"3. 2. Delivery. [No suggested changes from FSA-proposed language.]

"4. 3. The sample must be accompanied by: [No suggested changes from FSA-proposed language.]

“5. 4. The sample of the grain involved in the appeal ~~must be examined~~ is to be submitted for inspection as soon as possible. Such tests ~~must be applied~~ are to be performed as are necessary to determine the quality of the commingled grain based upon the applicable standards governing such grain under Section VII.B., or other relevant quality factors in the case of identity-preserved grain. Unless the appeal is dismissed, an appeal inspection ~~grade~~ certificate must be issued by the person ~~determining the grade~~ performing the appeal inspection, showing the ~~grade assigned by them~~ to inspection results for such grain. The appeal certificate will supercede the inspection certificate originally issued for the grain involved. The original or a copy of the ~~new grade~~ appeal certificate will be sent to the party requesting the appeal, and copies shall be further distributed to the depositor or holder of the warehouse receipt, the warehouse operator and the licensed inspector making the original ~~determination of grade~~ inspection result.”

Proposed Provider Agreement to Electronically File and Maintain Electronic Warehouse Receipts and U.S. Warehouse Act Documents (Exhibit C)

In addition to the comments provided pursuant to the proposed regulations applicable to providers as found in Section 735.401, the NGFA offers the following recommendations on FSA's proposed provider agreement (Exhibit C) for computer services seeking FSA approval to electronically transmit warehouse receipts and other USWA documents:

- 1. Section II.B.2. Access:** The NGFA recommends that FSA make information available on its web site or through e-mail communication to users/customers if the agency is notified by a provider that unforeseen circumstances will cause the central filing system to be inaccessible during required operating hours for more than one hour. It seems to make sense that if FSA is notified of such an “outage,” that it pass the information on to affected parties, rather than retain the information to itself. To accomplish this intent, it is suggested that a new third sentence be added that reads: **“In the event that the provider is operationally unable to convey information concerning access problems to its users/customers, FSA will convey such information to persons licensed under this Act that are users/customers of the provider through the agency's web site, media and/or other rapid communication methods.”**
- 2. Section III. Fees and Charges:** The NGFA believes it is important that FSA justify the \$9,000 annual fee proposed in Addendum 1 that is to be assessed to providers seeking to be approved to transmit electronic warehouse receipts and other USWA electronic documents.

On its face, the fee appears excessive, particularly given the \$2,000 annual fee currently charged to providers of electronic cotton receipts. The NGFA believes it is imperative that FSA maintain fees as low as possible, consistent with prudent oversight, so that excessive costs are not passed back to users/customers of such services through transaction fees or other service charges, thereby undermining the viability of transmitting such documents electronically. The NGFA also seeks clarification as to the amount of the “non-refundable application fee” that FSA intends to charge for companies seeking to become providers.

In addition, the NGFA seeks an amendment to Section III.B.2. to permit providers to offer differential fee schedules based upon the volume of business being conducted with individual – or groups of – users/customers. The NGFA believes this is particularly appropriate given that this section already would require providers to file their fee schedules with FSA, and require that the fees be made public upon demand. Specifically, the NGFA suggests the following language: “2. *Fees for the use of the CFS shall ~~not be assessed to users in a discriminatory manner~~ be fair and reasonable.”*

- 3. Section IV. Financial, Insurance and Audit Requirements:** As noted previously, the NGFA has been informed by several providers that the FSA-proposed \$10,000 maximum deductibility for insurance coverage will be difficult if not impossible to obtain, particularly given the fluid nature of the insurance industry following the recent terrorist attack on the United States. The NGFA encourages FSA to reconsider the amount of deductibility required for insurance coverage, and to adopt an achievable level that is consistent with sound business practice.

4. Section IX. Transferring Receipts or Documents:

- Consistent with its comments relevant to section IV.R.1.b. of the proposed Licensing Agreement for Grain, the NGFA opposes FSA’s proposal to impose a limit on the number of times a warehouse operator could change providers during a calendar year, and recommends that the last two sentences of Section IX.A. be deleted in their entirety. This is a matter to be decided in the commercial marketplace, not by FSA.
- Consistent with its comments relevant to Section IV.R.1.b. and IV.R.1.g., the NGFA recommends that Section IX.A.2.a. and b. of the provider agreement be modified to require that warehouse operators notify current providers and their licensing authority 30 days – rather than the proposed 60 days – prior to the transfer date for changing providers; and 15 days (rather than the proposed 30 days) for sending notification of a change of providers to holders of open electronic warehouse receipts.

- Consistent with its previous recommendations, the NGFA recommends that Section IX.A.5 be amended to authorize FSA to accept a transfer date for a switch in providers that is no less than 30 days (rather than the proposed 60 days) from the date the agency is notified of such a change.

Proposed Provider Agreement to Electronically File and Maintain Other Electronic Documents (Exhibit F)

In addition to the comments provided pursuant to the proposed regulations applicable to providers as found in Section 735.402, the NGFA offers the following recommendations on FSA's proposed provider agreement (Exhibit F) for computer services seeking FSA approval to electronically transmit other documents under the authority of the USWA:

- **Introduction:** In conversations with prospective providers of electronic documents, concerns were raised over the potential risk of data entry errors that could result if providers utilize the authority proposed by FSA to generate an electronic version of a non-negotiable document in a non-electronic format that is furnished to the provider. To reduce the potential for error and to lessen the potential insurance requirements imposed on providers, the NGFA would not object to the **deletion** of this paragraph, which currently reads as follows: *"If a non-negotiable document in a non-electronic format is presented to the Provider for transmission in their CFS, the Provider may generate an electronic version of such document but must maintain custody of the original non-negotiable document except as is authorized by FSA."*

In addition, providers uniformly cited the intricacies associated with letters of credit – and the potential for errors and omissions by the bank or other party generating the information for such documents – as creating a potential risk. Therefore, the NGFA reluctantly concurs that – at least initially – FSA may wish to exclude letters of credit as a form of electronic document for which a provider is approved by the agency under the USWA. Or, as suggested previously, FSA may wish to consider a higher minimum net worth and/or insurance requirement for providers wishing to transmit letters of credit. Either course of action would not preclude letters of credit from being transmitted electronically through non-FSA approved systems.

- **Section I. Terms and Conditions:** The NGFA recommends the following modifications:

-- Section I.E.: The NGFA urges that this provision be modified to provide an opportunity for providers and users/customers to consult with FSA on the fee schedule before it is finalized for the following year.

-- Section I.F.: Consistent with the recommendations made pursuant to the proposed provider agreement for electronic warehouse receipts and other USWA electronic documents, it is recommended that the third sentence in this section be amended to permit providers to offer differential fee schedules based upon the volume of business being conducted with an individual – or groups of – users/customers. The NGFA believes this is particularly appropriate given that this section already would require providers to file their fee schedules with FSA, and require that the fees be made public upon demand. Specifically, the NGFA suggests the following language: “*I.F. ...Fees assessed to users of the CFS must be levied in a non-discriminatory manner fair and reasonable.*”

-- Section 1.G.: Consistent with the recommendations made pursuant to the proposed regulations for providers of other electronic documents, the NGFA recommends that the minimum net worth requirement be reduced to a level approximating \$100,000 or somewhat greater, compared to the \$10 million proposed by FSA.

-- Section 1.H.: Consistent with its recommendations pursuant to Section IV of the proposed Provider Agreement for Electronic Warehouse Receipts and other USWA Electronic Documents, the NGFA encourages FSA to reconsider the amount of deductibility required for insurance coverage, and to adopt an achievable level that is consistent with sound business practice.

- **Section III. Suspension or Termination:** The NGFA recommends the following modifications:

-- Section III.A.: Because of the potential disruption to business, particularly during peak times such as harvest or periods of heavy U.S. grain sales, the NGFA urges that the provider or FSA be required to notify the other party in writing at least 90 calendar days (rather than the proposed 60 days) prior to the effective date when such provider services will be terminated. Further, the NGFA urges that immediate written notification also be disseminated to all users/customers of the provider, but in no case less than 75 calendar days prior to termination of service, to allow for a transition to a new provider. In addition, as currently worded, this provision as read literally would **not** require the provider to issue written notification to the user/customer unless the user/customer happened to be issuing an electronic commerce document during this “notification” period.

To rectify these deficiencies, the NGFA suggests the following changes to this section: “A. *The Provider or FSA may terminate this Agreement by providing the other party written notification 60 90 calendar days prior to the effective date of the termination. ~~During this 60-day period, prior to allowing a user to use the CFS, the Provider will notify the user of the date this~~*

~~Agreement will terminate.~~ **In such an event, the party terminating this Agreement shall provide written notification to all users/customers at least 75 calendar days prior to the effective date of the termination.**

- **Section IV. Amendment to this Agreement:** It is recommended that this provision be amended to provide for an annual consultation between FSA and providers and users/customers. The following language is suggested: **“FSA may amend this Agreement for any reason *after providing at least 90 calendar days’ written notice, unless the change is necessitated by an emergency.* If the Agreement is to be amended, the Provider may refuse to accept such amendment and terminate this Agreement in accordance with Section III. FSA shall provide for an annual consultation between FSA, Providers, users/customers of such providers, and State warehouse control agencies to discuss potential amendments to this Agreement.”**
- **Addendum 1:** Consistent with its comments concerning Section III of the proposed *Provider Agreement for Electronic Warehouse Receipts and other USWA Electronic Documents*, the NGFA questions the legitimacy of the \$9,000 annual fee proposed by FSA for providers of other electronic documents. If cumulative, this would amount to \$18,000 in annual fees for a provider seeking to offer services to transmit electronic warehouse receipts and seeking FSA approval for transmitting other electronic documents – which likely will erect a financial barrier that undercuts participation and/or makes the costs to users associated with engaging in electronic transactions prohibitive.

Conclusion

The NGFA commends USDA for issuing its proposed rules and provider agreements, and looks forward to working with USDA in implementing the statute in an expeditious manner.

Respectfully Submitted,



John C. Anderson
Chairman
Country Elevator Committee